IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 279 of 1998

with

CRIMINAL APPEAL No 215 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

GULABJI SALUJI BHAGORA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 279 of 1998
MR KB ANANDJIWALA for Appellant No. 1
MS NANDINI JOSHI, APP for Respondent No. 1

2. Criminal Appeal No. 215 of 1998
MR KB ANANDJIWALA for Appellant Nos. 1 to 3
MS NANDINI JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE J.R.VORA

Date of decision: 07/02/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE J.R.VORA)

1. Both these appeals have arisen from a common judgement and order passed by the learned Additional Sessions Judge, Sabarkantha at Himatnagar on 27th February, 1998 in Sessions Case No.67 of 1997. The appellants of both the appeals were the accused in the said sessions case.

2. The prosecution case was that on 06th December, 1995 the prosecutrix victim of the case, Manjula from her village along with her relatives i.e. cousin Rekhaben and her younger brother had gone to attend a public fair arranged at Aantarsuba Ashram at noon. All of them were returning in the afternoon from the fair boarding a tractor to their village. When they reached near village Kundala Kampa, all the four appellants had intercepted the tractor in which they were travelling back to their village. Appellant Gulabji Saluji, original accused No.1 had threatened the persons sitting in the tractor and the tractor driver, captured Manjula and thrown her out of the tractor in which she was travelling whereas the remaining three appellants had caught hold of Manjula, who was thrown out of the tractor by Gulabji and all the four appellants forcibly had taken away Manjula to the house of Gulabji, appellant-accused No.1, from there. The remaining three accused appellants except appellant No.1 - Gulabji Saluji had thereafter left house of accused No.1. Manjula was taken inside the house of accused No.1 and made to lie on a cot which was placed in the house of appellant - accused Gulabji Saluji and without her consent, according to the prosecution story, accused No.1 had committed rape on her. It is also the prosecution story that the appellant Gulabji Saluji had a pen-knief in his hand by which he had threatened Manjula. The relatives of Manjula who were travelling back, had gone to their village Kathroti in the same tractor and informed the parents of Manjula about the incident. At about 11:00, on that night Kamjibhai Karmaji Katara, uncle of Manjula and Prakash, elder brother of Manjula alongwith one Arjan Shakara Bhagora had gone to the house of the appellant Gulabji Saluji and asked him to hand over the custody of Manjula, but the appellant No.1 had refused to hand over Manjula to them. However, at last the appellant No.1 had taken to his heels and Manjula was handed over to her uncle and brother. Thereafter all of them had come to their village. Manjula was handed over to her mother who had informed her mother about rape committed by Gulabji Saluji.

3. On 8th December, 1995, a complaint was lodged by

Manjula before Vijaynagar Police Station which was recorded by one PSO Jitendrasinh Dashrathsinh, PW-10. He had registered the offences against the accused and victim Manjula was sent for medical examination at Idar. Medical Officer, Dr. Purshottam Kalabhai Gohil had examined Manjula and opined after examination of X-ray etc. that Manjula was aged about 16-years and sexual intercourse was committed with her recently.

4. Investigation initially was entrusted to Head Constable, Mulabhai Dayabhai who had seized the clothes of Manjula which she was wearing at the time of offence under a panchnama. Thereafter investigation was handedover to Circle Police Inspector, Kantilal Laxmanbhai Chavda who after recording statements of witnesses had prepared panchnama of scene of the offence and forwarded the muddamal to the Forensic Science Laboratory. The appellant Gulabji Saluji after arrest on 12th December, 1995 was sent to Medical Officer, Idar who had opined that Gulabji was capable of sexual intercourse and the trouser which he was wearing at the time of offence was also seized.

5. A Charge-sheet for the offences under Sections 363, 366, 376, 506(2) and 114 of I.P.C., was submitted before the learned Judicial Magistrate (F.C.) at Khedbrahma who in turn had committed the case to the Court of Sessions because the Sessions Court is the only competent Court for conducting the trial of the charges levelled against the accused.

6. Vide Ex.6 in the said Sessions Case No.67 of 1997, all the appellants were charged with the offences under Sections 363 and 366 read with Sections 114 and 506(2) of I.P.C., while appellant No.1 - Gulabji Saluji was charged for the offence under Section 376 and 506(2) of I.P.C. All the appellants had denied the charges levelled against them.

7. The prosecution examined 12 witnesses to prove the case. The prosecution examined (1) Dr.Rameshbhai Khemabhai at Ex.12, as PW-1 who had examined Gulabji Saluji; (2) the prosecutrix - Manjula as PW-2 at Ex.16; (3) Lilaben Ratanji, mother of the victim as PW-3 at Ex.20; (4) Rekhaben Kamjibhai who had accompanied the prosecutrix at the fare when she was kidnaped, as PW-4 at Ex.21; (5) Dr.Purshottam Kalabhai Gohil who had examined prosecutrix-Manjula as PW-5 at Ex.22; (6) Kanaksinh Sardarsinh PW-6; (7) PW-7 and PW-8 i.e. Karansinh Dharmasinh and Babubhai Virmaji at Ex.33 and Ex.35 respectively; (8) Shantilal Hiraji as PW-9 at Ex.39; (9)

Jitendrasinh Dashrathsinh, PW-10 who was a Head Constable of Vijaynagar Police Station and was PSO who recorded the complaint of victim - Manjula at Ex.40; (10) both the Investigating Officers, Mulabhai Dayabhai at Ex.43 and Kantilal Laxmanbhai Chavda, Ex.44 as PW-11 and PW-12 respectively.

8. The prosecution also tendered documentary evidence to prove the case. The medical certificate of Gulabji Saluji is produced at Ex.14; the medical certificate of victim - Manjula is produced at Ex.27; the panchnama of seizure of clothes of Manjula is produced at Ex.29, the panchnama of scene of offence is produced at Ex.34, the Police Station Diary of Vijaynagar Police Station in respect of entry No.4 is produced at Ex.41; F.I.R. which was recorded by PSO Jitendrasinh Dashrathsinh is produced at Ex.42; forwarding letter by which muddamal articles are sent is produced at Ex.46; opinion of Analyst alongwith Serological opinion after examining muddamal are produced at Ex.47 and Ex.48 respectively.

9. After recording all the evidence and hearing both the sides, the learned trial Judge found accused appellant - Gulabji Saluji guilty for the offences under Sections 363, 366, 506(2) and 376 of I.P.C. while remaining three appellants were found guilty for the offences under Sections 363, 366 read with Section 114 of I.P.C. All the appellants for the offence under Section 363 were sentenced to undergo rigorous imprisonment for five years and fine of Rs.1,000/= in default, simple imprisonment for one year. Each of the appellant was sentenced to undergo five years rigorous imprisonment for the offence punishable under Section 366 of I.P.C. and fine of Rs.2,000/= and in default, simple imprisonment for one year. Accused appellant - Gulabji Saluji was sentenced to undergo rigorous imprisonment for ten years for the offence of 376 of I.P.C. In addition to that, he was also fine of Rs.5,000/= and in default, to undergo simple imprisonment for one year. It was also directed that out of amount of fine of Rs.5,000/=, Rs.4,000/= be paid to prosecutrix - Manjula by way of compensation. Accused appellant Gulabji Saluji was also convicted for the offence under Section 506(2) of I.P.C. and was sentenced to undergo rigorous imprisonment for two years and directed to pay fine of Rs.1,000/= in default, simple imprisonment for three months. All the accused were given benefit of set-off. It was also directed by the learned trial Judge that all the punishment of imprisonment awarded to all of the accused shall run concurrently.

10. Being aggrieved by the above said judgement and order of conviction of the learned Additional Sessions Judge, Sabarkantha at Himatnagar, accused - Gulabji Saluji has filed Criminal Appeal No.279 of 1998 while the other remaining three accused filed Criminal Appeal No.215 of 1998. Since both the appeals have arisen from the common judgement as aforesaid they were heard together and are being decided by this common judgement.

11. Learned senior counsel Mr.K.B.Anandjiwala on behalf of the appellants of both the appeals submitted that the judgement of conviction and imposing the sentence on appellants is apparently erroneous.

12. The first and foremost submission which Mr.Anandjiwala advanced was regarding probability of the prosecution case. It was submitted that the story of the prosecutrix as narrated is highly improbable. In this respect learned counsel submitted that it is an admitted fact that there were 30-40 persons in the tractor from which it is alleged that prosecutrix Manjula was kidnaped and none of them had been examined as a witness in the case. It was submitted that, therefore, firstly the story of the prosecution case is improbable and that the prosecutrix is not corroborated by any independent evidence which was easily available to the investigation agency for which an adverse inference should be drawn against the prosecution. It was also submitted that in presence of 30-40 persons of the village of the prosecutrix, it was improbable for the accused to kidnap Manjula sitting in the tractor amongst 30-40 persons. It was submitted that if the story of kidnapping is improbable then the story of rape having been committed on her, as narrated by prosecutrix, becomes also improbable. It was also submitted that there are major contradictions and omissions in the evidence of prosecutrix - Manjula. It was submitted that the first contradiction is in respect of time factor. In the F.I.R., it is noted that the offence had taken place at about 3:00 p.m. while in the deposition of Manjula and the witnesses it was stated that they were returning from Aantarsuba Ashram fair at about 6:00 p.m. and at that time the incident had taken place. It was submitted that there is contradiction as to at what time the witnesses had gone to fair. Learned counsel for the appellants vehemently submitted that the offence had taken place on 6th December, 1995 and that the prosecution story reveals that on that night at about 11:00 Manjula was restored to her home but even then the complaint was filed only on 8th December, 1995 i.e. on the 3rd day and, therefore,

case is doubtful character. Learned counsel for the appellants submitted that this delay in filing the complaint is not explained and, therefore, the prosecution story is suspicious. It was also submitted that while lodging the complaint alongwith the prosecutrix, her father, Sarpanch of the village and other 8-9 persons were present which shows that false complaint was lodged against the accused after premeditation. It was also submitted that in her cross-examination the prosecutrix - Manjula has admitted that the complaint was dictated by her father and the Sarpanch and she was sitting outside the police station and had only subscribed her thumb impression to the complaint which makes prosecution story doubtful. It was, therefore, submitted that the F.I.R. which is exhibited by the trial Court is required to be de-exhibited.

In respect of the medical evidence, it was submitted that there were no injuries on private part of the prosecutrix. It was submitted that the medical expert opined that there was old tear of hymen. It was submitted that vagina allowed one finger with pain upto 1 c.m. Relying on these factors, learned counsel submitted that the story of the prosecutrix that she was raped for four times is highly and inherently improbable. It was submitted that injury marks on private part of the victim as well as the accused are bound to be noticed which are absent in this case and hence, the story of rape having been committed by accused No.1 cannot wholly be disbelieved. It was also submitted that according to the Serological as well as Forensic Science Laboratory opinions, no seminal stains were found on any of the muddamal articles which also suggests that the story which Manjula narrated was not probable.

Lastly, it was submitted that there was enmity between the family of the prosecutrix and the family of the accused. It was submitted that uncle of Manjula, one Amraji and Baba Bhagirathdas had fired shot against Vexi Vechat, who was Caste President and due to this fire shot Vexi Vechat was injured. Following this incident, there was a caste meeting in which it was proposed by the accused side that the family of the prosecutrix should be excommunicated and, therefore, the family of the prosecutrix wanted to see that the accused go to jail and for this enmity, this false case is concocted against the accused. It was submitted that this contention is supported by a fact that though the complaint was recorded on 8th December, 1995, immediately a report was required to be made to the competent Magistrate under

Section 157 of the Cr.P.C. but the report was made after 4 days i.e. to say that the complaint which was registered on 8th December, 1995 was sent to the Magistrate only on 12th December, 1995. It was, therefore, urged that the prosecution story is highly improbable. The prosecutrix is not corroborated by any independent evidence. There is delay in lodging F.I.R. as well as Major contradictions in the evidence of the witnesses and in the evidence of the prosecutrix and, therefore, the appellants atleast be given benefit of reasonable doubt.

13. On the other hand, learned A.P.P. Ms.Nandini Joshi on behalf of the State submitted that the evidence of the prosecutrix is unblemished and trustworthy. It was submitted that it is wrong to say that the prosecutrix is not corroborated. It was submitted that the prosecutrix Manjula is fully corroborated by the medical evidence as well as the evidence of Lilaben and Rekhaben, PW-3 and PW-4 who support the version of prosecutrix - Manjula. It was submitted that as per the medical opinion, it is revealed that the prosecutrix was subjected to recent sexual intercourse. It was also opined by the medical expert that she was not habituated to sexual intercourse. Forensic Science Laboratory also found blood stains on the clothes of the prosecutrix which is supportive evidence. It was submitted that ordinarily in rape cases prosecutrix need not be corroborated, if her evidence inspires confidence, while in this case, the prosecutrix not only inspires confidence but is also supported by corroborative evidence as said above. It was, therefore, submitted that the learned trial Judge rightly convicted accused Gulabji Saluji under Section 376 and 506(2) and conviction of all the four accused by the trial Court under Sections 363 and 366 read with Section 114 of the I.P.C. is also proper and requires no interference.

14. Having considered the contentions raised at the Bar as aforesaid, we have re-appreciated the evidence on record. Learned senior counsel Mr.Anandjiwala has taken us to each line of the evidence of the witnesses. We have also scrutinized the documentary evidence as well on the record of the case. What is required to be borne in mind is that, this is a rape case. Since last so many years, the Apex Court as well as other Courts of the country have observed as to how to appreciate the evidence in rape case, more particularly, the evidence of the prosecutrix. Needless to say that it is an established law that the prosecutrix in rape cases is not an accomplice. She is not a part-taker of the offence

and her evidence must be appreciated at par with the evidence of any other injured witness and if evidence of the prosecutrix inspires confidence, there is no rule of law that she requires any corroboration.

15. The Apex Court in State of Punjab Vs. Gurmit Singh and others as reported in AIR 1996 SC 1393 in respect as to whether the testimony of prosecutrix requires any corroboration and in respect of evidentiary value of the testimony of the prosecutrix has observed as under :

" The testimony of victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict and accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of

> judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formual and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. "

16. Appreciating the evidence of prosecutrix Manjula as per the test laid down by the Apex Court in aforesaid decision, we find that prosecutrix - Manjula has stated in her deposition that on the day of the incident with her younger sister Phuliben and Rekhaben and with her younger brother Popat they all were going to attend Aantarsuba Ashram fair, in a tractor owned by one Dalpatsinh. As per the say at about 12:00 p.m. in the noon, all of them had gone to attend the fair. According to Manjula, while at about 6:00 p.m., they were returning home in the said tractor in which other persons were also sitting and the present four appellants had intercepted the tractor near Village Kundala Kampa. She has stated that all the four appellants belong to Kundala Kampa village and that appellant - Gulabji Saluji had brandished a pen-knief at the tractor driver and threatened him to kill so the tractor driver stopped the tractor. As per her claim, the appellant No.1 had thereafter climbed up on the tractor whereas the remaining three appellants were standing on the road. She has stated that the appellant No.1 had captured her and, therefore, she had started weeping and in the meantime, the appellant No.1 had thrown her out of the tractor and she was caught hold by remaining three

appellants. According to her, all the four appellants had thereafter taken her to village Kundala Kampa at the residence of appellant No.1. Her evidence shows that the tractor had proceeded ahead towards the village of Manjula and all these persons had kept Manjula at the residence of appellant No.1 Gulabji Saluji and three appellants except appellant No.1 Gulabji Saluji had left the residence of Gulabji Saluji. According to her, Gulabji Saluji had closed the door of the house from inside and forcibly laid her on a cot which was kept in his residence and thereafter committed sexual act for four times with her against her wish. It is stated that she had tried to resist and stand up but Gulabji Saluji had overpowered her and threatened with a pen-knief in hand her to kill. Gulabji Saluji according to Manjula had injured her by his nails on her neck. At about 11:00 p.m., Kamjibhai Karmaji Katara, uncle of Manjula, Prakash, her elder brother and one Arjan Shakara Bhagora, according to Manjula had come to rescue her at the residence of Gulabji Saluji and uncle had asked Gulabji Saluji to hand over Manjula to them to which initially he had replied that Manjula would be given to them only in the morning but, however, on that night she was handed over to her uncle and brother who had taken her to her house. Manjula has further stated that she had narrated the story to her mother. On the next day, according to Manjula, she had been to Vijaynagar Police Station where she had lodged a complaint in respect of the incident before Vijaynagar Police Station. She stated that she had dictated the complaint and subscribed her thumb impression.

17. Appreciating this evidence of Manjula, we find that there is no major contradiction found in the cross-examination conducted by the defence so as to disbelieve her. An attempt has been made by the defence in the cross of Manjula to show that the complaint was in fact dictated by her father, her uncle Kamjibhai Karmaji Katara and Sarpanch of her village and she was sitting outside the police station. In confusing cross-examination, illiterate, rustic, tribal prosecutrix has half-heartedly admitted that the complaint was dictated by her father and her uncle. It clearly appears that without fully understanding the question in cross-examination she replied that the complaint was dictated by her father etc. and this was half-heartedly because in answer to very subsequent question asked by the cross-examiner, she said that the complaint was dictated by herself only. Considering the evidence of the prosecutrix in this respect as a whole, we find that she categorically stated in-chief that the complaint was

lodged by her and was recorded as per her say. In cross-examination also, she emphatically said that the complaint was lodged by herself only. This clearly denotes that the complaint was lodged by the prosecutrix only. This is more supported by an independent witness i.e. PW-10 Jitendrasinh Dashrathsinh at Ex.40. The witness deposed that on 8th December, 1995 he was in-charge of Vijaynagar Police Station right from 5:00 a.m. to 8:00 p.m. At about 12:35 p.m. the prosecutrix came to the police station and she declared the facts of the complaint. This witness categorically stated that he inquired and asked question to the prosecutrix and according to her say thereafter the complaint was recorded as was dictated by prosecutrix - Manjula. This witness Jitendrasinh Dashrathsinh further said that the prosecutrix subscribed her right hand thumb impression on the complaint in her presence and he also signed below the complaint because it was recorded in his presence. The witness further said that Ex.17 on record is the same complaint. The witness Jitendrasinh Dashrathsinh further deposed that thereafter an offence was registered and an entry was made in the police station diary of Vijaynagar Police Station vide Entry No.14. In his deposition he presented original station diary before the trial Court and also produced on record a xerox copy of the same at Ex.41. Nothing could be elicited in the cross-examination of this witness to disbelieve him. In fact, this is an unchallenged evidence to the effect that the witness had elicited through inquiring the facts of the offence and the prosecutrix had narrated and dictated the complaint. There is no reason to disbelieve this independent witness and he establishes that the complaint was lodged by the prosecutrix and not by anybody else. Appreciating this independent evidence with the evidence of the prosecutrix, it is clearly established that Ex.17 which is the complaint was lodged by the prosecutrix only and had been recorded by one PSO Jitendrasinh Dashrathsinh as had been dictated by the prosecutrix. Therefore, there is no substance in the contention that Ex.17 i.e. F.I.R. is required to be de-exhibited because the same is not the version of the prosecutrix as admitted by her. As aforesaid beyond any doubt by an independent evidence, it is established that the complaint was recorded by Jitendrasinh Dashrathsinh as per the say of the prosecutrix and after reading over the complaint to the prosecutrix, she had subscribed her thumb mark to the complaint, Ex.17.

18. Now appreciating the evidence of the prosecutrix as aforesaid, it is materially corroborated by the complaint Ex.17. It was submitted that there are major contradictions between the say of the prosecutrix and the

complaint but on appreciating the evidence of the prosecutrix as well as the contents of complaint Ex.17, we do not find any such major discrepancies which go to the root of the case of the prosecutrix so as to disbelieve the version of the prosecutrix. An attempt is made vide para 3 of the deposition of the prosecutrix that in the complaint as well as in the statements recorded by the police of Manjula, she didn't state that all the four appellants had intercepted the tractor or that the appellant Gulabji Saluji had brandished a pen-knief at the tractor driver and threatened him to kill, if the tractor were not stopped. While we appreciate this very aspect with the complaint Ex.17, she has clearly stated in the complaint Ex.17 that all the four appellants had intercepted the tractor, threatened the persons sitting in the tractor and after capturing her she was thrown out of the tractor. Therefore, in this view of the matter, there is no major contradiction as has been argued by the appellants' side which would go to the root of the prosecution case.

19. The incident had taken place on 6th December, 1995 as said above. The witnesses are from the backward area of the State and are tribal and rustic. After couple of years of the incident the prosecutrix, who is rustic deposed in the Court. In these circumstances, it is natural that there may be minor discrepancy. Appreciating the evidence of the prosecutrix in this manner, undoubtedly as aforesaid, the version of the prosecutrix, in material particulars, is supported and corroborated by the complaint Ex.17, except the above said contradiction which is minor in nature. The defence is not able to bring out any other major contradiction in the say of the prosecutrix. Therefore, the order of conviction passed by the trial Judge can be upheld solely on unblemish, trustworthy and reliable evidence of prosecutrix Manjula. However, if one looks for corroboration to the version of Manjula then the prosecutrix is supported and corroborated by other evidence to the fullest extent. The version of PW-5 Ex.22 Dr.Purshottam Kalabhai Gohil fully corroborates the say of the prosecutrix. This witness, to whom the prosecutrix was referred to for physical examination on 8th December, 1995 opined that recent sexual intercourse was done with the prosecutrix and the hymen was raptured. After examination of the body of the prosecutrix he gave the certificate at Ex.27. Noticeable aspect of the medical expert opinion is, he found abrasion injury on right neck and multiple abrasion injuries on left side neck of the prosecutrix which the prosecutrix has deposed. The expert also opined in his deposition that

the age of these injuries was 2-3 days. The medical expert also opined that the prosecutrix was not habituated to the sexual intercourse. There was a hymen raptured (old fibrosis). Explaining this old tear to hymen in cross-examination, the doctor stated that the hymen must have been raptured before 3-4 days of the examination. Therefore, the prosecutrix is fully supported and corroborated by the medical evidence. The fact that vagina allowed one finger by 1 c.m. by pain cannot discard the say of the prosecution that the rape was committed on her.

20. In addition to this, the prosecutrix is also supported by two other witnesses. One is her cousin sister Rekhaben who was accompanying the prosecutrix in the tractor in return journey to home and she is examined as PW-4 at Ex.21. She has supported the say of the prosecutrix that while the tractor reached near village Kundala Kampa, accused - Gulabji Saluji threatened the tractor driver and stopped the tractor. She also supported the version of the prosecutrix that Gulabji Saluji had climbed up on the tractor, captured Manjula and thrown her out of the tractor and the other three appellants had caught hold of her and thereafter all the four appellants had taken Manjula from that place. She further stated that thereafter they went to their village and this incident was narrated to the parents of Manjula and her parents. From the appreciation of the evidence of this witness, it is clear that the evidence of Rekhaben not only corroborates and supports the prosecutrix version but lends credence to the prosecution story on the aspect of probability. On being asked by the defence as to why the other persons sitting in the tractor had not intervene, this witness replied that a help was sought from the other persons sitting in the tractor, who were from village Kathroti, the village of the prosecutrix, but the other persons at the best of their wisdom did not intervene and said that they were helpless and could not do anything because they were under threat of the appellant. Therefore, the evidence of this witness excludes any possibility to disbelieve the prosecution case on the ground of improbability as has been argued by the appellant side that it was not probable that there were 30-40 persons in the tractor and none of them resisted or intervened.

The prosecutrix is further corroborated by the deposition of her mother Lilaben as PW-3 at Ex.20. She has categorically stated that in the evening her children came to village and narrated the incident which had occurred. She corroborated that her elder son Prakash

and Amraji had gone to village Kundala Kampa to bring back Manjula from the appellant and on that night Manjula had come back and informed her mother that she was raped by one boy. In cross-examination nothing could be brought to disbelieve this witness.

21. It was argued on behalf of the appellants that no independent witness was examined by the prosecution, though easily available to the prosecution. It was argued that admittedly there were 30-40 persons in the tractor and none of them has been examined and though the statement of the driver of the tractor was recorded but he has not been cited as a witness in the charge-sheet. It was submitted that, therefore, the case of the prosecutrix becomes suspicious and adverse inference be drawn against the prosecution. Appreciating the submission on behalf of the appellants, it is clear that the fact in issue is, whether the prosecutrix was kidnapped and raped. The law in this aspect is settled by the Apex Court in the case of State of Punjab Vs. Gurmit Singh and others (supra). Therefore, the evidence adduced by the prosecution is sufficient to establish the fact in issue. In criminal trial, it is not a rule of law that the Court must seek corroboration from independent witnesses. If the Court finds that the evidence adduced by the prosecution is sufficient to prove the fact in issue, the question that the prosecution is obliged to examine independent witness pales into insignificance. If the evidence adduced is insufficient or not reliable then the question arises as to what is the effect of non-examination of other witnesses if they were available.

22. The Apex Court further in Karnel Singh Vs. State of M.P. as reported in A.I.R. 1995 SC 2472 ruled as under :

> "7. We have carefully examined the evidence of the prosecutrix, the medical evidence of her examination and the evidence of the Investigating Officer and we are inclined to think there is no risk involved in accepting the version of the prosecutrix. Her evidence shows that she had joined the two accused persons hardly three days before the incident as a labourer under a contractor. She was, therefore, in not too familiar an environment. She was the only female worker just out of her teens. Besides,

the two accused persons and the prosecutrix there was one more person by the name Charan who was sent away to fetch tea. Taking advantage of the prosecutrix being alone in their company the appellant picked her up and took her inside the machine room, laid her on a pile of sand, removed her saree and petticoat, and had sexual intercourse with her against her wish. After he had satisfied his lust, he called his companion but before the latter could have her, she ran away and narrated the incident to Multanabai and then went in search of her husband, a rickshaw puller. After narrating the incident to him, both of them went to the police station and lodged the complaint, Exhibit P.1, at about 4-10 p.m. It was said that there was considerable delay and sufficient time for tutoring and, therefore, her evidence could not be believed. There is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less then promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathies with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. The possibility of tutoring is ruled out because the evidence does not show that her husband knew the appellant and his companion before the incident. She too had started work hardly three days before and, therefore, she had no reason to falsely involve the appellant. No such reason is even suggested. She was a poor labourer hired by a contractor just a few days back and had no enmity with the appellant and his companion. Nor is there any such history so far as her

husband is concerned. There is, therefore, no reason to doubt her word. As for corroboration the find of semen stains on her 'saya' and in her vagina lends sufficient assurance to her accusation. In state of Maharashtra v. Chandraprakash Kewal Chand Jain (1999) 1 SCC 550 : (AIR 1990 SC 658), this Court speaking through one of us (Ahmadi, J.) had an occasion to point out that a woman who is a victim of a sexual assault is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. She is not in the category of a child witness or an accomplice and therefore the rule of prudence that her evidence must be

corroborated in material particulars has no application, at the most the Court may look for some evidence which lends assurance. "

23. Further the prosecutrix when inspires confidence then the defect of the investigating agency not examining independent witnesses must not uproot the story of the the prosecutrix so as to dishonour her. In para 5 and 6 of the above referred judgement of Karnel Singh Vs. State of M.P., the Apex Court observed as under :

"5. Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a

proper seizure-memo in regard to the 'Chadi'. That is the reason why we have said the investigation was slip shod and defective.

6. We must admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury."

24. In this view of the matter merely because the driver of the tractor has not been examined by the prosecution would not shake the prosecution case and must not discredit the evidence of the prosecutrix.

25. Learned counsel for the appellant further averred that there was enmity between both the families and, therefore, this whole case is concocted upon the appellant because the family of the prosecutrix wanted to see that the appellant goes to jail.

26. The enmity between the families is sought to be brought on record by way of suggestions only which have not been accepted by the witnesses. Meaning thereby that it could not be established by the defence that there was such enmity between the two families. There is nothing on record to denote this aspect. Even if there be any enmity, having regard to social placement of women in India none would prefer to say, for revenge only, that girl or woman of his family was ravished by someone, staking reputation of family and member who might have been raped.

27. In Promod Mahto and others Vs. The State of Bihar as reported in AIR 1989 SC 1475, it is made clear that even there be any enmity, no unmarried girl would go to the extent of staking her reputation and set up a case of rape. In para 9, the Apex Court observed as under :

" Mr.A.K.Sen, learned Senior advocate appearing for the appellants,

sought leave to canvass the conviction of the appellants on its merits and contended that the case has been foisted on the appellants due to communal feelings, that there has been inordinate delay in lodging the First Information Report and that the prosecution case that the appellants had committed rape in succession on a plurality of victims is a biological impossibility and hence the prosecution case is wholly unworthy of acceptance. We found no merit in those contentions because even if communal feelings had run high, it is inconceivable that an unmarried girl and two married women would go to the extent of staking their reputation and future in order to falsely set up a case of rape on them for the sake of communal interests. As regards the delay in lodging the first information report, the Sessions Judge and the High Court have considered the matter fully and held that the delay has been satisfactorily explained and we found no reason to differ from the view taken by the Sessions Judge and the High Court. In so far as the last contention is concerned, we found that the defence has not been able to explain how else PW 1 Jaiboon Nisa, an unmarried girl aged about 15 or 16 years, could have come to sustain the telltale marks and injuries of rape on her person as were found by PW 1 Dr. Abha Singh unless she had been raped by the appellants. Once it is established that the appellants had acted in concert and entered the house of the victims and thereafter raped PW 1 Jaiboon Nisa, then all of them would be guilty under Section 376 IPC in terms of Explanation I to Clause (g) of Sub-section (2) of Section 376 IPC irrespective of whether she had been raped by one or more of them. The Explanation in question reads as under :-

"Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to

have committed gang rape within the meaning of this sub-section." "

28. In Prithi Chand Vs. State of Himachal Pradesh, as reported in AIR 1989 SC 702, the Supreme Court ruled that the prosecutrix and her parents would not allow real culprit to escape and falsely involve innocent person in commission of crime. In para 9, the Apex Court observed as under :

"9. It was next contended that the appellant was falsely involved due to a long standing enmity between father of the appellant and the girl's father. The prosecutrix has in her deposition stated that the two families were not talking or visiting terms, since their relations were strained. It was suggested in the course of cross-examination that Ratna, the son of PW-8 Phulan Devi was intimate with the prosecutrix and he had raped the girl. In his statement under Section 313 of the Code of Criminal Procedure, he put forth the case that when he returned to his village in the evening, he saw some ladies at the girl's house and heard the girl saying that she was subjected to rape by Ratna. It is not possible to believe that the prosecutrix and her parents would allow the real culprit to escape and falsely involve an innocent person for the commission of the crime. Except for the suggestion made in the cross-examination of PW-8 Phulan Devi, Ratna's mother and the statement under Section 313 of the Code of Criminal Procedure there is no other material on record which can give credence to the suggestion."

29. Therefore, in this view of the matter, it is very difficult to believe that due to enmity as has been suggested during cross-examination by the defence, this false case was imposed upon the appellant and the parents of the prosecutrix concocted false case of rape and kidnapping. There is no merit in this submission and, hence, on this count, the case of the prosecution cannot be disbelieved.

30. The next contention which learned counsel for the appellant urged was regarding delay in filing the F.I.R. It was urged that the incident took place as alleged on 6th December, 1995 and as per the prosecution story, the girl was returned home at 11:00 p.m. at that night, but the complaint came to be lodged only on 8th December, 1995 and, therefore, there were all probabilities and possibilities of concoction and manipulation.

31. In rape cases delay in lodging F.I.R. must be appreciated on broad probabilities. A judge of facts must apply common sense rule and prudence of ordinary human while testing the reasonability of the prosecution case. Needless to say that reputation of unmarried female is always at stake in filing of complaint for rape. Having regard to the social condition in this country, undoubtedly, all concerned before filing such complaint would first thoughtfully consider all the pros and cons and some delay is natural to occur in such cases. Therefore, lodging of complaint less than promptly in such cases in this country never raises inference that the complaint is false. In the case of Karnal Singh Vs. State of M.P. (Supra) in para 7 as stated above, the Supreme Court observed that the reluctance to go to the police in such cases is because of societie's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathies with her and, therefore, delay in lodging complaint in such cases. In this view of the matter merely because the complaint is lodged on 3rd day of the incident it cannot be said that the complaint is manipulation or concoction, more particularly, when the evidence of the prosecutrix well scrutinized on judicial anvil is found satisfactory. Though, in this particular case, the delay in lodging complaint on 3rd day has been explained by the witnesses. In cross when the prosecutrix was confronted with the complaint and her further statement recorded by police, the prosecutrix has stated that she had stated in the complaint that the relatives of the complainant were out of village to attend the fair and, therefore, the complaint was filed on 8th December, 1995. It is further stated by the complainant that some persons of the family of the complainant had gone to village Kundala Kampa to attend marriage and, therefore, this issue was under consideration which resulted into some delay in filing the complaint on 8th December, 1995. In our view, there is no such delay in lodging F.I.R. so as to cast shadow of doubt on prosecution case and plausible and acceptable explanation for filing complaint on 08.12.1995 has also been given by the prosecutrix.

32. Thus, in this view of the matter, there is no such delay in filing the complaint which would discredit the prosecution case and that, if there is any delay it is well explained by the prosecutrix in her deposition. Therefore, we do not accept the submission made on behalf of the appellant that since the complaint is lodged late, there are possibilities of concoction and manipulation. Alongwith this submission, it was also urged that delay in lodging F.I.R. is more suspicious because the police made report to the Magistrate under Section 157 of Code of Criminal Procedure after four days of recording of the complaint which is required to be done immediately by the concerned police officer. It is pointed out that the report is made to the Magistrate on 12th December, 1995. Considering this submission made on behalf of the appellants it is clear that merely sending report under Section 157 of Code of Criminal Procedure late to the Magistrate is not fatal to the prosecution case unless it is shown that this delay is intentional and with some ulterior motive. The prosecution has examined police witnesses in this case. So far as the prosecutrix is concerned, these witnesses are independent witnesses and there is no reason that to assist her and for the benefit of the prosecutrix the police officers would concoct a false case of rape upon the accused. Explanation of this submission is on record. An independent witness PW-10 at Ex.40 Jitendrasinh Dashrathsinh who recorded the complaint has deposed that after recording of the complaint an entry (xerox copy of which is produced on record at Ex.41) was made in police station diary which was produced before the Court and this evidence is sufficient to come to the conclusion that the complaint was recorded and entered into police station register as stated by this witness Jitendrasinh Dashrathsinh. Further, this witness in his cross-examination specifically stated that F.I.R. under Section 157 of Code of Criminal Procedure was received by the concerned Magistrate 4 days late because it was lying with the despatch constable. Despatch Constable, according to this witness, is separate and Independent Officer for despatching such reports to Magistrate. Meaning thereby that after recording of the complaint, this witness forwarded F.I.R. to despatch clerk of the police station where somehow it could not be despatched to the concerned Magistrate immediately. These circumstances supported by the evidence of independent witness clearly establishes that receiving report under Section 157 of the Code of Criminal Procedure by the Magistrate 4 days after lodging of the complaint is not fatal to the prosecution case.

33. It was then submitted by learned counsel for the

appellant that on muddamal articles i.e. clothes of victim or appellant - Gulabji Saluji no seminal stains were found. There is no evidence, according to learned counsel, by the report of Serological Expert, Ex.48 denoting that muddamal article Nos.1,2,5 and 7 contained seminal stains of which muddamal article No.1 is 'langho' and muddamal article No.2 is underwear of the prosecutrix. It was urged that this is also an evidence casting doubt on prosecution case that had the prosecutrix been raped by Gulabji Saluji then seminal stains and spermatozoa would have been noticed by serological report. In rape cases when the evidence of prosecutrix is reliable and inspires confidence, finding of presence or absence of spermatozoa on the clothes or on the vaginal smear of the prosecutrix is not significant.

34. In the case of State of Himachal Pradesh Vs. Lekh Raj and another, as reported in AIR 1999 SC 3916 in para 5 observed as under :

> "5. We are, however, of the opinion that the High Court was not justified in holding that the prosecutrix had not been subjected to forcible sexual intercourse or the prosecution had failed to prove the case against the respondent No.1 also. To hold that the prosecution had not proved the case against the respondent, beyond reasonable doubt, the High Court mainly relied upon the medical evidence and finding that "no dead or alive spermatozoa were seen. Absence of such dead or mobile spermatozoa either in the vagina or in the cervix of the prosecutrix rules out the possibility of the prosecutrix having been subjected to sexual intercourse on the date and time alleged by the prosecution". Such a conclusion is not referable to any evidence on record. No such suggestion was put to the doctor nor any medical authority referred to in support of the conclusion arrived at by the High Court. This Court in State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550 : (AIR 1990 SC 658 : 1990 Cri LJ 889) relying upon medical evidence observed that "spermatozoa can be found if the woman is examined within 12 hours

after intercourse, thereafter they may be found between 48 and 72 hours but in dead form. If the prosecutrix washes herself by then, the spermatozoa may not be found. In that case the Court after satisfying itself regarding the presence of semen on the cloths of the prosecutrix held that "the absence of semen or spermatozoa in the vaginal smear and slides, cannot cast doubt on the creditworthiness of the prosecutrix".

Modi in his medical Jurisprudence and Toxicology has noted :

"The presence of spermatozoa in the vagina after intercourse has been reported by Pollak (1943) from 30 minutes to 17 days, and by Morrison (1972) 9 days in vagina and 12 days in the cervix. However, in the vagina of a dead woman, they persist for a longer period.""

35. Thus, when the evidence of prosecutrix is found satisfactory, the absence of spermatozoa on the clothes or vaginal smear cannot cast doubt on the credit worthiness of the prosecutrix case because rule of law is that the testimony of the victim in the cases of rape is vital and unless there are compelling reasons necessitating the Court to look for the corroboration, there cannot be any difficulty to act on testimony of the victim alone to convict the accused of course where testimony of the prosecutrix inspires confidence and is found to be reliable. The evidence of prosecutrix needs no corroboration that vagina or her clothes should contain spermatozoa when she complains of rape and, therefore, this submission also has no force.

36. In State of Gujarat Vs. Vikramji Aluji Thakor as reported in 1998 (1) GLR 734 as far as this aspect is concerned, it is observed as under :

" From the report of Chemical Analyzer it is clearly established that on bush-shirt of the victim human blood of "B" origin was found which was also found from the pant of the accused. This circumstances goes a long way against the

> accused. This circumstance, however, does not assist the accused since the incident took place on May 8, 1989 and the accused was medically examined on May 9, 1989, i.e., on the next day. Moreover, as seen above, human blood of "B" group of the victim was found on bush-shirt of Harsha as also on the pant of the accused. Mr.Sheth could not point out from the evidence that any injury was caused to the accused which resulted into oozing of blood of the accused and presence of human blood of "B" origin on his pant which was of prosecutrix Harsha. From arrest panchnama (Exh.27) it appears that the accused had an abrasion on shoulder, but neither from the panchnama nor from the deposition of panch witness Laxmanbhai, it is proved that blood was oozing. Absence of spermatozoa on vaginal smear does not falsify the version of prosecutrix as regards the act of rape committed on her. "

37. In this case also, it is clear that the offence was committed at night of 6th December, 1995 and the prosecutrix was sent for physical examination on 8th December, 1995 i.e. after two days and on that day her clothes were seized by the police. Absence of spermatozoa on clothes of the prosecutrix Manjula, therefore, would not discredit her version.

38. Thus, in view of the aforesaid discussion, we have found that the evidence of the prosecution, more particularly, the prosecutrix is creditworthy and reliable and the conviction awarded by the Trial Court to all the appellants requires no interference.

39. Lastly, on the question of quantum of sentence, it was submitted on behalf of the appellants - original accused Nos.2,3 and 4, appellants in Criminal Appeal No.215 of 1998 who are sentenced to undergo five years imprisonment and to pay fine on each count for the offences under Sections 363 and 366 of I.P.C., that they are released on bail by this Court though they were in custody from the date of conviction and remained in custody for two-and-half years while appellant Gulabji Saluji, original accused No.1, appellant in Criminal Appeal No.278 of 1998 is in judicial custody since his arrest. It was urged that all the four appellants are younger in age and, therefore, if the contentions on

merits are not accepted the quantum of sentence be reduced and all the appellants be sentenced to imprisonment which they have already undergone. It is submitted that the appellant Gulabji Saluji is 31-years-old whereas the appellants - Kaluji Saluji, Lalji Saluji, and Khemaji Saluji are 24, 40 and 34 of age respectively. Each of the appellant is married and having children. Therefore, the age of the appellants as well as their family background should be considered while imposing sentence. On these grounds it is urged that, the sentence be reduced to imprisonment undergone by the appellants.

40. In Shri Bodhisattwa Gautam, Vs. Miss Subhra Chakraborty as reported in AIR 1996 SC 922, the Supreme Court observed that

> " Rape is not only a crime against the persons of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.

41. In view of the above observation of the Apex Court there cannot be any leniency in imposing of punishment. The social background after rape and the circumstances in which the victim is normally placed in the society will have to be appreciated and the Court must be sensitive to this aspect also while imposing sentence in rape cases. It is not that the situation and the circumstances of the accused alone should be considered while determining the quantum of punishment in rape cases but the victim also should not be forgotten by the Court.

42. In this case the appellant - Gulabji Saluji is found guilty of committing rape while remaining three appellants are found guilty of kidnapping and abetting Accused No.1 and found guilty for committing offences

under Sections 363, 366 read with Section 114 of I.P.C. As aforesaid, having regard to the peculiar circumstances of the rape case, no leniency can be shown in imposition of sentence on the accused of rape crime. While in this case, having regard to the facts, no leniency is also required to be shown to either of three appellants of Criminal Appeal No.215 of 1998 in respect of quantum of punishment of imprisonment for the simple reason that these three appellants facilitated the commission of most hated crime of rape. Conviction rates for rape are still lower than any other major crime and the woman continue to make grievance that in rape cases the victimized women, rather than the rapists, were put on trial and, therefore, in this view of the matter we are unable to accept the contention of the appellants to reduce the sentence imposed by the trial Judge.

43. For the aforesaid reasons both the appeals i.e. Criminal Appeal No.279 of 1998 as well as Criminal Appeal No.215 of 1998 are dismissed. Muddamal to be dealt with as directed by the Trial Court.

44. At this juncture, learned advocate for the appellants submits that the appellants of Criminal Appeal No.215 of 1998 i.e. Kaluji Saluji Bhagora, Lalji Saluji Bhagora and Khemaji Saluji Bhagora are on bail and, therefore, reasonable time be granted to these three appellants to surrender before the competent authority. Having regard to the facts and circumstances of the case, time upto 14th April, 2002 to surrender is granted. The appellants Kaluji Saluji Bhagora, Lalji Saluji Bhagora and Khemaji Saluji Bhagora are directed to surrender before the competent authority on or before 14th April, 2002.

[J.M.Panchal,J] [J.R.Vora,J]

'Bhavesh'